COURT'S ORDER I
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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6056 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH Sd/-
and
Hon'ble MR.JUSTICE D.A.MEHTA Seend

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

GARDEN FINANCE LTD

Versus

ADDL COMMISSIONER OF INCOME TAX

Appearance:
1. Special Civil Application No. 6056 of 2001
MR JP SHAH for Petitioner No. 1
MR MIHIR JOSHI with MANISH R BHATT for Respondent No. 1

CORAM : MR.JUSTICE M.S.SHAH
and
MR.JUSTICE D.A.MEHTA

Date of decision: 6/11/2001

CAV JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

In this petition under Article 226 of the Constitution, the petitioner-Company, which is engaged in the business of financing and trading in shares, has challenged the notice dated 28.5.2001 (Annexure "A") issued by the Additional Commissioner of Income-tax, Special Range-1, Surat under Section 148 of the Income-tax Act, 1961 (hereinafter referred to as "the Act") stating that the said officer had reason to believe that the income chargeable to tax for the assessment year 1994-95 has escaped assessment within the meaning of Section 147 of the Act and, therefore, the petitioner has been called upon to file a return of the petitioner's income for the said assessment year. The notice further states that the same has been issued after obtaining necessary satisfaction of the Commissioner of Income-tax, Surat.

2. On 30.11.1994 the petitioner filed its return of income for the accounting year 1.4.1993 to 31.3.1994, particularly in the following terms (Annexure "B" to the petition) :-

Income from Business :

Net profit as per Profit
and Loss Account. Rs.1,55,30,579

Net income from business Rs.1,47,10,414

Short-term capital gain/(loss) Rs. (05,43,422)

Long-term capital gain/(loss) Rs.(1,38,35,748)

Total capital loss to be
carried forward for set off
in subsequent years Rs.1,43,79,170

Income from other sources:

Gross dividend Rs. 88,511

Total Income Rs. Nil

Tax Due Rs. Nil

Tax deducted at source Rs. 20,323

Less : TDS : Dividend Rs. 20,323

Hence, Refund Due Rs. 20,323

3. Upon receiving the impugned notice dated 28.5.2001 (Annexure "A"), the petitioner approached this Court and pointed out in the petition that -

3.1 During assessment year 1994-95 the petitioner had sold 1,87,575 shares of Garden Silk Mills Ltd. (`Garden silk' for brevity). The petitioner submitted its return for the assessment year 1994-95 on 30.11.1994 and annexed therewith the order of this Court for amalgamation of M/s Vareli Textile Industries Limited ('Vareli Textiles' for brevity - the amalgamating Company) with Garden Silk (the amalgamated Company), the statement of capital gain showing the sale of the shares of Garden Silk, the year of acquisition and the statement of shareholding in Garden Silk (the amalgamated Company). The computation of total income showed total capital loss of Rs.1,43,79,170/-.

3.2 During the course of assessment proceedings, the Assessing Officer addressed a letter dated 18.11.1996 to the petitioner enquiring about the loss of Rs.1,43,79,170/and asked the petitioner to furnish, inter alia, the following information :-

(i) How and from where the sold shares were acquired ?
(ii) Rates at which shares were purchased and the basis of working of cost of acquisition thereof, and
(iii) Evidence in support of sale and purchase rate on the dates of acquisition and sales respectively.

3.3 The petitioner with its reply letter dated 3.12.1996 produced the statement showing the particulars of acquisition of shares sold during the year and the statement showing the particulars of cost of acquisition and working of capital gain. The said statements showed the computation of the long term capital loss of Rs.1,41,47,576/-. All the above documents clearly show that the cost of acquisition in the hands of the amalgamating Company was very much shown but the petitioner adopted as its cost price, the market rate of Rs.91.25 per share of Garden Silk Mills Ltd. prevailing on Bombay Stock Exchange as on 31.3.1988. The Assessing Officer also made full inquiry on the point of capital loss of Rs.1,41,47,576 since he was conducting a scrutiny assessment. The Assessing Officer passed the assessment

order dated 23.9.1997 computing total loss of Rs.1,43,79,170/-.

3.4 The petitioner has challenged the impugned notice under Section 148 on the ground that the notice is issued beyond a period of four years; such a notice can be issued beyond a period of four years only if the petitioner had failed to disclose fully and truly all material facts necessary for its assessment while filing the return for the relevant year i.e. A.Y. 1994-95. The petitioner has contended that the regular assessment for the said assessment year was made under Section 143(3) of the Act, after calling for and scrutinizing all the relevant and material information and particulars from the petitioner which the petitioner had disclosed at the time of the scrutiny assessment.

4. In response to the notice issued by this Court, affidavit in reply dated 3.9.2001 has been filed on behalf of the respondent. Annexure A to the reply affidavit contains the reasons recorded for issue of the notice under Section 148 of the Act. It is pointed out in the reasons and thereafter in the reply affidavit as under :-

4.1 The petitioner had actually purchased 3,75,150 shares of Vareli Textiles on 6.4.1987 from M/s Kashah Investments Ltd., its group Company, for Rs. 75,40,515/-. According to the order of the Company Court, Vareli Textiles was subsequently amalgamated into M/s Garden Silk Mills Ltd. with effect from 4.1.1988 at the conversion ratio of 1:2. Thus, the original holdings of 3,75,150 shares of Vareli Textiles were converted into 1,87,575 shares of M/s Garden Silk Mills Ltd. The actual cost price after applying the index as per the provisions of Section 49(2) read with Section 47(vii) would be Rs. 1,06,97,010/- (75,40,515 x 244/172). The petitioner subsequently sold all these shares for Rs.1,01,34,038/to its directors and their relatives during the financial year relevant to assessment year 1994-95.

4.2 However, the petitioner in its computation of income for capital gain, adopted the cost of these shares at Rs.91.25 per share on the basis of market price prevailing in the Stock Exchange as on 31.3.1988. Thus, the indexed cost of acquisition as worked out by the petitioner is Rs.2,42,81,584/- as against actual indexed cost of Rs.1,06,97,010/- as stated above. Thus, the capital loss from these transactions is only Rs.5,62,672/instead of Rs.1,43,79,170/- as stated by the assessee in the computation of total income. The

computation of income filed alongwith the return of income (Annexures "B" & "C" to the petition) does not reflect the true picture of cost of acquisition and date of acquisition. As per the computation of income (Annexures "B" & "D" to the petition), the cost of acquisition of 1,87,575 shares of Garden Silk Mills in financial year 1989-90 is shown as Rs.1,71,16,219/- at the market rate of per share as on 31.3.1988. It was duty of the petitioner to take Rs.75,40,515/- as the cost of acquisition of shares of Vareli Textiles on 6.4.1987 for the purpose of computation of capital gain. Instead, the petitioner has taken market rate prevailing on the date of amalgamation as the cost of acquisition of the shares which is contrary to the provisions of Section 49(2) of the Act. Nowhere in the Chart (Annexure "D" to the petition) it was mentioned that the original shares were acquired in financial year 1987-88. Thus, the cost of shares and the year of acquisition was not worked out by the petitioner as per the provisions of Sections 47(vii) and 49(2) of the Act.

4.3 The Additional Commissioner of Income-tax (Asst), Spl.R.1, Surat then concluded the reasons as under :-

"In the assessment finalized u/s. 143(3) of the Act, the capital loss on sale of such shares was claimed at Rs.1,41,47,543/- and same was allowed on account of failure on the part of the assessee to furnish full and true details, resulting into escapement of income.

Therefore, I have reason to believe that income to the above extent has escaped assessment within the meaning of section 147 r.w.s. 148 on account of failure on the part of the assessee to furnish true and complete details. Accordingly notice u/s. 148 r.w.s. 147 is issued in this case after obtaining satisfaction of the CIT, Surat."

4.4 The petitioner failed to disclose fully and truly all these material facts to work out the correct computation of income from capital gain. The petitioner did not show that 3,75,150 shares of Vareli Textiles were purchased on 6.4.1987. For the purpose of working out the capital gains, the cost of acquisition of shares of (Vareli Textiles (the amalgamating Company) as on 6.4.1987 was required to be taken into account as per the provisions of Section 49(2) of the Act and not the market price of the shares of the amalgamated Company as on 31.3.1988. It is, therefore, submitted that instead

computing the capital loss from the transactions in question only at Rs.5,62,972/-, the petitioner computed the capital loss at Rs.1,43,79,170/-.

5. At the hearing of the petition, Mr JP Shah, learned counsel for the petitioner has submitted that since the petitioner had disclosed fully and truly all material facts necessary for its assessment and since the Assessing Officer conducted the scrutiny assessment under Section 143(3) of the Act, made all necessary inquiries regarding computation of the capital loss and about the cost of their shares and the petitioner had disclosed that the cost of acquisition of the shares of Vareli Textiles Was Rs.75,40,515/-, and since the computation of capital loss was made by the petitioner as per its understanding of the law and the Assessing Officer agreed with the said understanding of the law, the condition precedent for issuance of notice under Sections 147 and 148 of the Act has not been satisfied. If at all any income has escaped assessment, it is not because of the fact that the petitioner had not fully and truly disclosed all material facts necessary for its assessment, but because the then Assessing Officer agreed with the petitioner that the cost of the shares sold in its hand is Rs.91.25 as contended by the petitioner. Merely because the Assessing Officer might have made a mistake in not applying the correct legal provision which is now invoked, that cannot be a ground for issuing notice under Section 148 of the Act beyond a period of four years from the date of completion of assessment year 1994-95 in respect of which notice has been issued. Strong reliance has been placed on the decision of the Apex Court in Calcutta Discount Co. Ltd. vs. ITO, 41 ITR 191 = AIR 1861 SC 372.

6. On the other hand, Mr Mihir Joshi, learned counsel for the revenue has vehemently opposed the petition and submitted that in exercise of writ jurisdiction under Article 226 of the Constitution, a writ of certiorari or a writ of prohibition is to be issued only in fit cases. The assessee had deliberately supplied erroneous computation of capital loss and had inflated the extent of capital loss from Rs.5,62,972/- to Rs.1,43,79,170/-. The assessee had never disclosed that the shares in question i.e. 3,75,150 shares of Vareli Textiles were purchased by the assessee on 6.4.1987. Instead the assessee had shown the date of acquisition of shares as 1989-90 (Exh. D Pg. 17). Merely by stating in Exh. D (pg. 17) that the original cost of acquisition of shares of amalgamating Company was Rs.75,40,515/- and that the cost of 1,87,575 new shares

of Garden Silk (in exchange of its holding of 3,75,150 shares of Vareli Textiles) was taken at the market rate of Rs.91.25 per share of Garden Silk prevailing at Bombay Stock Exchange on 31.3.1988, the assessee did not disclose fully and correctly all the material facts.

Mr Joshi submitted that this was not a case where two views were possible, the Assessing Officer took one view and the notice under Section 148 is issued for taking the other view. The provisions of Section 49(2) of the Act are too obvious to leave any doubt. According to the said provision, the assessee was required to give the cost of acquisition of shares in amalgamating Company (Vareli Textiles) on 6.4.1987 which date was never disclosed by the assessee in its return or during the course of scrutiny. The learned counsel then submitted that the assessee is given an opportunity to file another return of income for the assessment year 1994-95 because the correct income has escaped assessment and, therefore, this Court may not exercise its extraordinary, prerogative discretionary writ jurisdiction under Article 226 of the Constitution in favour of an assessee who is not at all in a position to justify its case on merits in face of the clear legal provisions.

7. Before dealing with the rival submissions, it is necessary to refer to the relevant statutory provisions of the Act.

Chapter VI of the Income-tax Act provides for computation of total income under different heads of income. Sub-chapter E provides for levy and computation of capital gains. Section 45(1) provides that any profits or gains arising from the transfer of a capital asset effected in the previous year shall ... ... be chargeable to income-tax under the head "Capital Gains" and shall be deemed to be the income of the previous year in which the transfer took place. Section 47(vii) provides that nothing contained in Section 45 shall apply to any transfer by a shareholder, in a scheme of amalgamation, of a capital asset being a share or shares held by him in the amalgamating Company, if the transfer is made in consideration of the allotment to him of any share or shares in the amalgamated Company and the amalgamated Company is an Indian Company. Section 48 provides for the mode of computation and particularly provides that the income chargeable under the head "Capital gains" shall be computed, by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset, inter alia, the cost of acquisition of the asset. The second proviso

to Section 48 further provides that where long term capital gain arises from the transfer of a long term capital asset, the aforesaid provision about the cost of acquisition of the asset shall mean the indexed cost of acquisition which means an amount which bears to the cost of acquisition in the same proportion as Cost Inflation Index for the year in which the asset is transferred bears to the Cost Inflation Index. Section 49(2) reads as under :-

"49(2) Where the capital asset being a share or shares in an amalgamated Company which is an Indian Company became the property of the assessee in consideration of a transfer referred to in clause (vii) of Section 47, the cost of acquisition of the asset shall be deemed to be cost of acquisition to him of the share or shares in the amalgamating Company."

(emphasis supplied)

8. The revenue has pointed out that for computing the cost of acquisition of the shares in question, the assessee was required to compute the cost of acquisition of 3,75,150 shares in M/s Vareli Textile Industries Ltd. (amalgamating Company) which the assessee purchased on 6.4.1987 from M/s Kashah Investments Ltd., its group Company, for Rs.75,40,515/-. On that basis, the indexed cost of acquisition worked out to 75,40,515 x 244/172 = Rs.1,06,97,010/-. Upon subsequent amalgamation of Vareli Textiles with Garden Silk, the assessee was allotted 1,87,575 shares in Garden Silk in lieu of its shares in Vareli Textiles. The petitioner subsequently sold these shares for Rs.1,01,34,038/- to its Directors and their relatives during the financial year relevant to assessment year 1994-95. Hence, the capital loss was only Rs.5,62,972/-.

9. Exh. "C" (page 16 of the paper book) particularly item No. 1 thereof is reproduced on the left hand side hereinbelow to show how the petitioner had made a clear attempt to mislead the revenue by not giving the correct picture :-

STATEMENT OF CAPITAL GAIN : CORRECT FACTS GIVEN AT THE TIME OF SCRUTINY ASSESSMENT	REQUIRED TO BE GIVEN BY ASSESSEE AS PER SEC.49(2)

Year of Acquisition: 1989-90 6.4.1987

Company :	Garden Silk Mills Ltd.	Shares in Vareli Textiles (amalgamating Company)
No. of shares :	1,87,575 converted into 1,87,575 shares of Garden Silk (amalgamated Company)	3,75,150 shares
Rate :	Rs.91.25	
Cost :	Rs.1,71,16,219	Rs. 75,40,515
Indexed Cost :	Rs.2,42,81,584	Rs.1,06,97,010
Sales :	Rs.1,01,34,038	Rs.1,01,34,038
Profit/ (Loss) :	(Rs.1,41,47,546)	(Rs. 5,62,972)
Long-term Gain/(Loss):	(Rs,1,41,47,546)	(Rs. 5,62,972)

In the statement at Exh. D-1 (page 18 of the paper book), the above figures are again repeated in the first nine columns, and in the last two columns (10 & 11) tucked away in the folded portion of the large spread sheet paper it is inconspicuously mentioned as under :-

Cost as per Accounts	Profit/Loss as per Accounts
75,40,155	25,92,883

In the aforesaid manner, the assessee's capital loss was inflated by Rs.1,35,84,574/- (i.e. Rs.1,41,47,546 less Rs.5,62,972) and the assessee adjusted the said long term capital loss (Rs.1,41,47,546) against the net profit of Rs.1,55,30,529 (Rs.1.55 Crores approximately) and with another capital loss of Rs.5,43,422/-, the assessee's tax liability was reduced to nil.

10. The Court, therefore, finds considerable substance in the submission made by the learned counsel for the revenue that when the assessee misled the revenue so brazenly by relying on the market price of the shares of the amalgamated Company (Garden Silk) as on 31.3.1988 the assessee cannot be permitted to take advantage of its own wrong and that too by invoking the discretionary jurisdiction of this Court under Article 226 of the Constitution.

11. An attempt is, however made by the learned counsel for the assessee that in another statement at Exh. "D" (page 17) which was also produced before the Assessing Officer, the assessee had mentioned that the original cost of acquisition of shares of amalgamating Company was Rs.75,40,515/- and, therefore, all the material facts were fully and truly disclosed. However, the statement shows that 3,75,150 shares in the amalgamating Company were acquired in the year 1989-90. The said statement also contains the following prominent note conspicuously set out in the centre of the statement:-

"The Company was allotted 1,87,575 new shares of Garden Silk Mills Limited in exchange of its holding of 3,75,150 shares of Vareli Textile Industries Ltd. with Garden Silk Mills Limited w.e.f. 01.04.1988. The cost of 1,87,575 new shares has been taken at market rate of Rs.91.25 per share of Garden Silk Mills Ltd. prevailing on Bombay Stock Exchange as on 31.03.1988. Copy of order of Gujarat High Court for amalgamation of Vareli Textile Industries Limited with Garden Silk Mills Limited is enclosed."

(emphasis supplied)

The note is followed by YEARWISE SUMMARY.

Year of Acquisition	No. of Shares of Amalgamated Company	Rate of Acquisition
1989-90	1,87,575	Rs.91.25

There is some discrepancy about the adate of amalgamation whether was 4.1.1988 or 1.4.1988. We are, however, not required to go into that question as, apart

from the fact that neither side has produced the order of amalgamation, there is no dispute about the fact that the petitioner had purchased the shares in the amalgamating Company on 6.4.1987 much prior to the date of amalgamation.

It is thus clear that the petitioner had all along computed the capital loss on the basis of the market price of the shares of the amalgamated Company as on 31.3.1988 and had not computed the same on the basis of acquisition of shares in amalgamating Company (Vareli Textiles) on 6.4.1987 which was the date on which the petitioner had purchased the shares of Vareli Textiles which subsequently was amalgamated into Garden Silk with conversion ratio of 2:1.

12. We entirely agree with the submission of Mr Joshi for the revenue that this was not a case where two views were possible, the Assessing Officer took one view and the Revenue has issued a notice under Section 148 of the Act for taking another view. A perusal of the provisions of Section 49(2) are too crystal clear to admit of any doubt. No Assessing Officer acting honestly and bona fide would have ever assessed the capital loss suffered by the petitioner on the basis of the market price of the shares in the amalgamated Company (Garden Silk) as on 31.3.1988 - the basis for computation of capital loss all along adopted by the petitioner. We are unable to accept the contention urged on behalf of the assessee that whatever may be the reasons which might have weighed with the Assessing Officer in accepting the computation made by the petitioner for computing the capital loss at Rs.1.07 Crores (approx.) as against Rs. 5.6 lacs (approx.) which is the capital loss proposed to be assessed by the respondent in the impugned notice under Section 148 of the Act, this Court must interfere with the impugned notice under Section 148 of the Act only on the ground that in one of the statements sent by the petitioner to the Assessing Officer during the scrutiny assessment under Section 143(3) of the Act, the assessee had indicated that the shares in the amalgamating Company were acquired at a cost of Rs.75,40,515/-. In paragraphs 9 to 11 we have already dealt with this submission.

13. In Phool Chand Bajrang vs. ITO, 203 ITR 456, the Apex Court had an occasion to frown upon such tendency on the part of the assessee.

> "an Income-tax Officer ... ... may start reassessment proceedings either because some

> fresh facts had come to light which were not previously disclosed or some information with regard to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of those facts. In such situations, it is not a case of mere change of opinion or the drawing of a different inference from the same facts as were earlier available but acting on fresh information. Since the belief is that of the Income-tax Officer, the sufficiency of reasons for forming the belief is not for the court to judge but it is open to an assessee to establish that there in fact existed no belief or that the belief was not at all a bona fide one or was based on vague, irrelevant and non-specific information. To that limited extent, the court may look into the conclusion arrived at by the Income-tax Officer and further whether that material has any rational connection or a live link for the formation of the requisite belief.

... .

> We are not persuaded to accept the argument of Mr Sharma that the question the truthfulness or falsehood of the transactions reflected in the return can only be examined during the original assessment proceedings and not at any stage subsequent thereto. The argument is too broad and general in nature and does violence to the plain phraseology of sections 147(a) and 148 of the Act and is against the settled law laid down by this court. We have to look to the purpose and intent of the provisions. One of the purposes of section 147 appears to us to be to ensure that a party cannot get away by wilfully making a false or untrue statement at the time of original assessment and when that falsity comes to notice, to turn around and say "you accepted my lie, now your hands are tied and you can do nothing". It would be a travesty of justice to allow the assessee that latitude."

(emphasis supplied)

In our view, these observations are clearly applicable to the facts of the instant case and in exercise of its extraordinary prerogative and discretionary writ jurisdiction under Article 226 of the Constitution, this Court would be loath to interfere with

the impugned notice under Section 148 of the Act when the assessee had all along adopted the market price of the shares of the amalgamated Company (Garden Silk) for working out the capital loss at Rs.1.07 Crores (approx.), as against the capital loss which could have been worked out at only Rs.5.6 lacs (approx.) on the basis of the cost of acquisition of shares in the amalgamating Company (Vareli Textiles) as on 6.4.1987 (which date was not disclosed earlier) as per the provisions of Section 49(2) of the Act, which computation made by the assessee could never have been accepted by any officer acting bona fide.

We are of the view that from the material presently available on record with the respondent, the respondent could form a belief that by not disclosing 6.4.1987 as the date of acquisition of 3,75,150 shares in Vareli Textiles (amalgamating Company) and by showing 1989-90 as the year of acquisition of the said shareholding in question, the petitioner had failed to make a true and full disclosure of all material facts necessary for his assessment during the concluded assessment proceedings for assessment year 1994-95 and that by such failure income to the tune of more than Rs. One Crore has escaped assessment and that the material has reasonable connection with the formation of the belief as aforesaid. The assessee has failed to establish that there in fact exists no belief or that the belief is not at all a bona fide one or is based on vague, irrelevant or non-specific information.

14. As regards the reliance placed by the learned counsel for the petitioner on the decision of the Apex Court in Calcutta Discount Co. Ltd. vs. ITO, 41 ITR 191, it is pertinent to note that the Apex Court justified the issuance of a writ of prohibition in fit cases in order to prevent harassment of the assessee and made the following observations :-

> "Though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts will issue appropriate orders or directions to prevent such consequences. Writ of certiorari and prohibition can issue against Income Tax Officer acting

without jurisdiction under S. 34 of the 1922 Act equivalent to Section 141 of the 1961 Act."

(emphasis supplied)

15. We do not think that this is a fit case for exercise of our writ jurisdiction. In the facts and circumstances of the case, we do not think that the petitioner being required to file the return under Section 148 read with Section 147 of the Act amounts to, any unnecessary harassment as alleged. On the contrary, we are of the view that in the facts and circumstances of the case the revenue is justified in invoking the following observations made by the Apex Court in the Calcutta Discount Co. Ltd. (Supra) :-

"The duty of disclosing all the primary facts relevant to the decision of the question before the assessing authority lies on the assessee. To meet a possible contention that when some account books or other evidence has been produced, there is no duty on the assessee to disclose further facts, which on due diligence, the Income-tax Officer might have discovered, the Legislature has put in the Explanation. His omission to bring to the assessing authority's attention these particular items in the account books, or the particular portions of the documents, which are relevant, will amount to "omission to disclose fully and truly all material facts necessary for his assessment." Nor will he be able to contend successfully that by disclosing certain evidence, he should be deemed to have disclosed other evidence, which might have been discovered by the assessing authority if he had pursued investigation on the basis of what has been disclosed."

As already stated hereinabove, there is nothing on record to show that the assessee had indicated that the shares in the amalgamating Company were acquired by the petitioner on 6.4.1987. On the contrary, an attempt was made to show that the petitioner has acquired the shares in question in the year 1989-90 i.e. after the date of amalgamation of the Vareli Textiles (the amalgamating Company) into the Garden Silks (the amalgamated Company). Therefore, there was omission to disclose fully and truly all material facts necessary for

the assessment as pointed out in paragraphs 8 to 11 hereinabove.

16. We would also like to refer to the decision of the Apex Court in A.M. Allison vs. B.L. Sen, AIR 1957 SC 227 laying that writ jurisdiction is not to be exercised merely when an illegality is shown, if there is no failure of justice. In the facts and in the circumstances of the case, we do not find any illegality, much less any failure of justice resulting from issuance of the impugned notice under Section 148 of the Act requiring the assessee to file a return in respect of income which has escaped assessment.

17. For the reasons aforesaid, the petition deserves to be dismissed and is accordingly dismissed. Notice is discharged with costs which are quantified at Rs. 5,000/- (Rupees Five thousand only) which shall be paid by the petitioner to the respondent within one month from today.

Ad-interim relief is vacated.

Sd/-

(M.S. Shah, J.)

Seen

(D.A. Mehta, J.)

sundar/-

COURT'S ORDER II

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6056 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH Seen
and
Hon'ble MR.JUSTICE D.A.MEHTA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy : NO

of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

GARDEN FINANCE LTD

Versus

ADDL COMMISSIONER OF INCOME TAX

Appearance:
MR JP SHAH for Petitioner No. 1
MR MIHIR JOSHI with MR MANISH R BHATT for Respondent No. 1

CORAM : MR.JUSTICE M.S.SHAH
and
MR.JUSTICE D.A.MEHTA

Date of decision: 6/11/2001

CAV JUDGEMENT

(Per : MR.JUSTICE D.A.MEHTA)

I have gone through the judgment / order rendered by my learned brother and for the reasons that follow I place on record a separate concurring judgement.

2. Though the facts narrated by my learned brother are correctly stated, I may state some of the facts elaborately so as to focus on the controversy and the reasons for which I am of the opinion that this petition deserves to be rejected.

3. The petitioner - Company filed its return of income along with the computation of total income whereby the total income is computed at Rs. NIL after deduction of depreciation allowance to the extent of income available. In so far as the addition of capital gains is concerned, long-term capital loss which is required to be carried forward for set off in subsequent years has been computed at a figure of Rs.1,43,79,170/-. As can be seen from the assessment order, the assessing officer also has stated in the first line of his order that the return of income showing a taxable income at Rs. NIL is filed on 30th November, 1984. Even the computation made by the assessing officer in paragraph 11 commences by taking the figure of net profit as per P & L A/c. and after deducting depreciation at a reduced figure, the total

income is worked out at Rs.10,41,260/-. The working under the head capital gain is separately shown and the figure of total capital loss has no reflection for the purpose of assessing this year's tax liability.

4. As per provisions of Section 71(3) of the Act, in any assessment year, where the net result of computation under the head capital gain is a loss and the assessee has income assessable under any other head of income, the assessee is not entitled to set off such loss against income from any other head. Section 74 of the Act provides for treatment of losses under the head capital gain. In the present case, neither side has placed on record as to whether the long-term capital loss computed for assessment year 1994-95 has been set off or not in any of the subsequent years, because carry forward of such loss is permissible only for a period of eight years as provided in Section 74 (2) of the Act.

5. As can be seen from the reasons recorded, the respondent does not dispute that the petitioner assessee has given complete details for the purpose of working out the long-term capital loss and the basis adopted by the petitioner in taking Rs.91.25 per share as the cost of acquisition. But there is a catch. The relevant extract from the reasons recorded reads as under :

> " It is seen from statement of capital gain that assess has shown a loss of Rs.1,41,47,576/- on account of sale of 187575 shares of "Garden Silk Mills Limited" for Rs.1,01,34,038/-. It is seen that assess has adopted cost of these shares @ Rs.91.25 per share and shown to be acquired in FY 89-90. Thus indexed cost of acquisition is arrived at Rs.2,42,81,584/-.
>
> However, on scrutiny of earlier year's record, it is seen that assess inter-alia had 363575 equity shares of Ms. Garden Silk Mills Limited for Rs.10/- fully paid up. The book value as on 31.3.93 of these shares was shown at Rs.1,99,29,317/-. The aforesaid share holding included 187575 equity shares of Garden Silk Mills Limited which were acquired as a result of amalgamation of M/s. Vareli Textile Industries Limited in which 375150 shares were held by assessee. On amalgamation the original

holding of 375150 shares of M/s. Vareli Textile Industries Limited was converted in to 187575 shares of M/s. Garden Silk Mills Limited as per conversion ration of 1:2.

The market value of shares as in the year of amalgamation in 1989-90 was shown at Rs.91.25 per share totaling to Rs.1,71,16,219/- and thus this rate of Rs.91.25 per share can not be taken as the cost of acquisition of these shares, which has been taken by the assessee. The assessee has failed to furnish true and complete details of cost of these shares which was to be determined with reference to cost of erstwhile share of Vareli Textile Industries Limited namely amalgamated company. The assessee had incorrectly shown the cost with reference to market value of shares of M/s. Vareli Textile Industries Ltd. at Rs.1,71,56,219/- in 1988-89 instead of cost determined on the basis of cost of acquisition of shares of Vareli Textile Industries Limited. Actually 3,75,150 shares were purchased by assessee on 6.4.87 from Kashah Investments Ltd. for Rs.75,40,515/-.

The very shares were converted into 1,87,575 shares of M/s. Garden Mills Ltd. on amalgamation. Now these shares are sold for Rs.1,01,34,038/- to the directors and their relatives.

Thus in the computation of income by way of capital gain arising from transfer of such shares the cost of M/s. Garden Silk Mills Ltd. was to be taken at Rs.75,40,515/- as per provision of section 49(2) r.w.s. 47 [vii] of the Act instead of Rs.1,70,16,219/- wrongly taken. If the correct provision is applied the index cost of acquisition of 187575 shares would be Rs.1,06,97,010/[7540515 * 244/172], whereas assessee has incorrectly shown such indexed cost of acquisition at Rs.2,42,81,584/-." (emphasis supplied)

6. The proviso to Section 147 of the Act :

" Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 of section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year." (emphasis supplied)

Therefore, as can be seen the proviso can be invoked when a completed assessment is sought to be reopened after expiry of four years from the end of the relevant assessment years, provided any income chargeable to tax as escaped assessment by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. The concept of "by reason of failure" has to be understood in the context of the fact that the Proviso is an exception to the main section. The language used by the statute is very important. It is not sufficient that there is omission or failure on the part of the assessee in regard to the matters mentioned in the provisions, but it is further necessary that the officer should be in a position to satisfy that the escapement of income was by a reason of or as a result of such omission or failure.

7. Therefore, as can be seen from the records, it is not possible to ascertain as to how and why the assessee adopted cost of acquisition at Rs.91.25 per share, and also how and why 187575 shares were shown to be acquired in Financial Year 1989-90. Though in the petition and during the course of hearing, it was submitted that the cost of shares has been taken at market price as on 31st March, 1988, the basis for the same is not forthcoming. The statement of share holding of Garden Silk Mills Limited (amalgamated company) which is filed at page 17 as part of annexure to the computation of total income states that 187575 shares were allotted w.e.f. 1st

April, 1988 on amalgamation. As regards this date, the respondent has stated in its affidavit-in-reply that as per order of the High Court, amalgamation was w.e.f. 4th January, 1988. Therefore, it is apparent that there is a discrepancy in so far as the date of amalgamation is concerned and it is not open, in these proceedings, to enter into disputed question of fact.

8. In light of this position, it is not possible to state with certainty that there was no omission or failure on part of the petitioner, especially in light of provision of Section 49(2) r.w.s. 47(vii) of the Act.

9. The settled legal position is that the assumption of jurisdiction under Section 147 of the Act has to be ascertained with reference to the reasons recorded, and it is not permissible to the respondent to improve upon the reasons recorded by referring to the affidavit-in-reply. Any challenge to the assumption of jurisdiction under Section 147 of the Act has to be tested on the anvil of the reasons recorded. In this context, the submissions of Mr.Mihir Joshi, learned counsel for the revenue, as recorded by my learned brother in paragraphs 6 and 10 of his judgement were not warranted. The contention in paragraph 6, that the assessee had deliberately supplied erroneous computation of capital loss; the contention in paragraph 10, that the assessee mislead the revenue so brazenly by relying on the market price, are not borne out as per reasons recorded and cannot be countenanced.

10. Before parting I may refer to the observations made by the Supreme Court in the case of Phool Chand Bajrang Lal and another Vs. Income-Tax Officer and another, 203 ITR 456, wherein the Court has stated at page 478 as follows :

> " . . . . .We would like to clarify that nothing said by us hereinabove should be construed as any expression of opinion on the merits of the reassessment since we have referred to various facts and law only with a view to determine whether or not the Income-tax Officer, Azamgarh, was justified in law in initiating the reassessment proceedings under sections 147(a) and 148 of the Income-tax Act, 1961, in the facts and circumstances of this case."

The same would be the position as regards any

observations made by the Court hereinbefore.

11. I therefore agree with the final order passed by my learned brother. In view of the aforestated position, the petition is summarily rejected, notice is discharged. Ad-interim relief granted on 30th July, 2001 stands vacated.

Seen Sd/-

(M.S.Shah, J) (D.A.Mehta,J)

'Bhavesh'